No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution's separation-of-powers requirement is violated by the inclusion on the Federal Election Commission of two *ex officio* members selected by the Congress, where the statute denies them the right to vote and requires that all decisions on the exercise of the Commission's executive powers be made by majority vote of six Commissioners appointed by the President in conformity with Article II, Sec. 2, Cl. 2 of the Constitution.

2. Whether, if question 1 is answered in the affirmative, the actions taken pursuant to statutory authority by the Commission over the course of almost two decades prior to this decision should be accorded *de facto* validity, as this Court did when it found the structure of the original Commission unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976).

STATEMENT NAMING ADDITIONAL PARTIES

Named parties not reflected in the caption are respondent GRANT A. WILLS, as Treasurer of the NRA Political Victory Fund, and respondent NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION.

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The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Federal Election Commission v. NRA Political Victory Fund, et al.*, 6 F.3d 821 (D.C. Cir. 1993).

OPINIONS BELOW

The October 22, 1993, decision of a panel of the court of appeals reversed the district court's judgment in favor of the Commission in this civil law enforcement proceeding. In doing so, the court found that 2 U.S.C. § 437c(a)(1) violates the constitutional requirement of separation of powers in providing for

the inclusion on the Commission of two *ex officio* members, with no right to vote on the exercise of the Commission's powers, who are selected by the Congress. The court then reversed the district court's judgment without reaching the merits of the violations found by the district court, on the ground that an agency whose structure violates the Constitution cannot conduct civil law enforcement litigation.

The appellate court's opinion, as amended October 25, 1993, is reported at 6 F.3d 821 (D.C. Cir. 1993), and is reprinted as Appendix A (App. 1a-18a), bound with this petition. The district court's November 15, 1991, opinion and order are reported at 778 F. Supp. 62 (D.D.C. 1991), and appear, as amended December 10, 1991, in Appendix B (App. 19a-35a).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Federal Election Campaign Act of 1971, as amended ("the Act"),[1] codified at 2 U.S.C. §§ 431-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1565; by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3357; by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 663 (1988); by Pub. L. No. 101-

455, establishes the Commission as an independent agency with exclusive jurisdiction over the administration and civil enforcement of the Act. 2 U.S.C. § 437c(b)(1). The Act provides that "[t]he Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). The court of appeals found unconstitutional the part of section 437c(a)(1) that includes on the Commission the two nonvoting *ex officio* members selected by Congress. Appendix F (App. 42a-67a) sets out in full 2 U.S.C. § 437c and other provisions of the Act describing the Commission's structure, powers, and duties.

STATEMENT OF THE CASE

A. The Federal Election Commission

The Commission is the independent agency of the United States Government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c (b)(1), 437d(a), (e), and 437g. The Commission has six voting members appointed to staggered six-year terms by the President, with the advice and consent of the Senate. 2 U.S.C. §§ 437c(a)(1), 437c (a)(2)(A). No more than three of these members may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). The affirmative votes of at least four of these six members are required for any official

194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989); by Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990); and by Pub. L. No. 102-90, Title I, Sec. 6(d), 105 Stat. 451 (1991).

Commission action, and a voting Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission," 2 U.S.C. § 437c(c). Affirmative votes of four of these six Commissioners are specifically required for finding that there is "reason to believe" a violation of the Act has occurred, which initiates a Commission investigation, 2 U.S.C. § 437g(a)(2), or finding that there is "probable cause to believe" that a violation has occurred, which leads to mandatory conciliation efforts. 2 U.S.C. §§ 437c(c), 437g(a)(4). If conciliation fails, the Commission, upon the affirmative vote of at least four of these six Commissioners, may decide to file a *de novo* civil enforcement suit, like the present case. 2 U.S.C. § 437g(a)(6)(A).

Section 437c(a)(1) also includes on the Commission two additional officials, the Secretary of the Senate and the Clerk of the House of Representatives, or their designees. The statute specifies, however, that these two officials serve only in an *ex officio* capacity, do not have the right to vote on the exercise of any of the Commission's powers, and may not serve as chairman or vice chairman of the Commission. 2 U.S.C. § 437c(a)(1), (5). The Commission's procedural rules, adopted pursuant to 2 U.S.C. § 437c(e), deny the *ex officio* members such procedural rights as calling a meeting, voting to adjourn or to select a presiding officer in the absence of the chairman, and being counted in determining the presence of a quorum. Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

B. The NRA Violated 2 U.S.C. § 441b By Contributing More Than $400,000 In Corporate Funds To Its Separate Segregated Fund

The Act prohibits a corporation from making "a contribution or expenditure in connection with any federal election," 2 U.S.C. § 441b.[2] The Act also prohibits political committees from knowingly accepting such corporate contributions, 2 U.S.C. § 441b(a). A limited exception to this prohibition permits a corporation to use its general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by [the] corporation," 2 U.S.C. § 441b(b)(2)(C), so long as the contributions to the fund are solicited only from the corporation's stockholders and executive or administrative personnel and their families, 2 U.S.C. § 441b(b)(4)(A), and from a membership corporation's members, 2 U.S.C. § 441b(b)(4)(C). If a separate segregated fund chooses instead to expend its own funds for such administrative or solicitation expenses, the connected corporation may reimburse the fund for these expenditures "no later than 30 calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3).

The National Rifle Association ("NRA") is a nonprofit membership corporation that operates a separate segregated fund, established pursuant to 2 U.S.C. § 441b(b)(2)(C), called NRA Political Victory Fund ("PVF"). (App. 20a.) PVF is registered

[2] For purposes of this corporate prohibition, "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" is a "contribution or expenditure." 2 U.S.C. § 441b(b)(2).

with the Commission under 2 U.S.C. § 431(4) as a multi-candidate political committee that contributes to federal candidates.

In March and July 1988, a division of NRA used corporate funds to produce and mail to NRA members letters soliciting contributions to PVF. (App. 20a.) On August 1, 1988, PVF transferred to this NRA division $415,744.72, an amount equal to the combined cost of the solicitations. (App. 20a-21a.) Later, respondent Grant A. Wills, who was both PVF's treasurer and the NRA division's fiscal officer, concluded that because PVF's expected revenues had not met projections PVF had insufficient funds for the political contributions and expenditures NRA wanted to make during the upcoming election campaign. (App. 22a, 23a.) To remedy this deficit, the NRA division transferred $415,744.72 of its corporate funds to PVF on October 20, 1988, just 19 days before the November 8, 1988, election. (App. 21a.) PVF quickly converted these corporate funds into political contributions and expenditures. (App. 3a.)[3]

C. The Administrative Proceedings

In October 1989, by an affirmative vote of at least four of the presidentially appointed Commissioners, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the respondents had violated 2 U.S.C. § 441b(a) as a result of the NRA division's October 20, 1988, transfer to PVF of $415,744.72 in corporate funds. *See* App. C. After an investigation, the Commission, by an affirmative vote of at least

[3] In the 18 days after the October 20th transfer of corporate funds to PVF, PVF made more than $262,000 in direct and in-kind contributions to 110 federal candidates in 38 states.

four of the presidentially appointed Commissioners, found "probable cause to believe," 2 U.S.C. § 437g(a)(4)(A)(i), that the respondents had violated the provision. *See* App. D. When conciliation attempts failed, the Commission, by an affirmative vote of at least four of the presidentially appointed Commissioners, authorized the filing of the present civil enforcement action. 2 U.S.C. § 437g(a)(6)(A). *See* App. E. At no time during the administrative proceedings did NRA object to the participation of the *ex officio* members, request their exclusion from the case, or question the Commission's constitutional authority to conduct the proceedings or make any of these determinations.

D. The Proceedings in the District Court

On cross-motions for summary judgment, the district court found that the October 20 transfer of money was too late under the Commission's regulations to be a lawful reimbursement for solicitation expenditures (App. 22a) and was "intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates" (App. 23a). Accordingly, the district court held that the transfer of $415,744.72 in corporate funds to PVF was a corporate contribution that violated 2 U.S.C. § 441b. (App. 24a.) The court assessed a $40,000 civil penalty (App. 33a) and enjoined the defendants from repeating their violations, finding that "the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements" (App. 33a) and that their arguments "would make a mockery of the campaign finance laws" (App. 33a).

NRA raised several affirmative constitutional defenses, among which was the claim that Congress violated the Constitution's separation-of-powers requirement by placing the Secretary of the Senate and the Clerk of the House, or their designees, on the Commission in a nonvoting, *ex officio* capacity. The district court concluded that this argument provided no defense in this civil law enforcement suit because NRA had neither alleged nor provided evidence that the congressional employees, serving at the Commission only in a nonvoting, *ex officio* capacity, had affected any of the Commission's actions against the NRA. (App. 26a.) Accordingly, the court found that NRA had failed to show a sufficient stake in the resolution of this constitutional issue to require the court to resolve it in this lawsuit. The court also noted, however, that because the Secretary of the Senate and the Clerk of the House have no vote, they "have no real say in the outcome of any Commission proceedings" (App. 26a).

E. The Proceedings in the Court of Appeals

A two-judge panel of the D.C. Circuit reversed the district court's judgment.[4] The court did not reach the merits of the violation found by the district court, but instead addressed only NRA's constitutionally based attacks on the Commission. (App. 4a.) The court found NRA's other constitutional attacks on the Commission to be either wrong or nonjusticiable in the circumstances of this case (App. 8a-12a), but it found that the Commission's structure violated the constitutional separation-of-powers doctrine in that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members" (App. 2a).

[4] Justice Ginsburg sat on the appellate panel that heard oral argument in this case, but "did not participate in [the court's] opinion" (App. 1a n.*).

The court of appeals explicitly acknowledged that its holding went beyond any of this Court's prior precedents, because the congressional agents whose roles this Court had previously found to violate separation of powers always "possessed explicit voting or decisionmaking power that is not present here" (App. 15a). But the court found the lack of any power to vote on the exercise of the Commission's executive powers to be of no significance. "Even if the *ex officio* members were to remain completely silent during all deliberations . . . , their mere presence as agents of Congress conveys a tacit message to the other Commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other Commissioners" (App. 13a-14a). Thus, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution" (App. 15a).

> The Constitution . . . "anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere "informational or advisory role" in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the

exercise of its influence, whether in the form of advice or not, to its legislative role.

(App. 15a.)

The court then held that, under the Act's severability clause, 2 U.S.C. § 454, "the unconstitutional *ex officio* membership provision can be severed from the rest of [the Act]," so that "Congress is not even required after our decision, as it was after *Buckley* [*v. Valeo*, 424 U.S. 1 (1976),] to amend the statute" (App. 17a, 16a). But the court rejected the Commission's argument that, regardless of whether the *ex officio* provision is constitutional, the civil law enforcement action against NRA should be preserved under the *de facto* officer doctrine. (App. 17a-18a.) The court acknowledged that this Court had applied the *de facto* officer doctrine to validate the Commission's past actions in *Buckley* when it found the Commission's structure, which then included four *voting* Commissioners appointed by Congress, violated the Constitution's separation-of-powers requirement. (App. 17a.) But the court of appeals found *Buckley* distinguishable because the relief sought in that declaratory judgment case "could have purely prospective impact," while in the context of an affirmative defense to an enforcement suit no prospective relief is available, and the court could not "declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (App. 17a, 18a).

On October 26, 1993, the Commission voted to reconstitute itself as a six-member agency without *ex officio* members in accord with the court of appeals decision, subject to further action by this Court. The reconstituted Commission has devoted a large

part of its resources to ratifying or reconsidering its prior actions in all ongoing proceedings in an effort to continue to administer and enforce the Act as effectively as possible under the restrictions of the decision below. The adequacy of the Commission's efforts to comply with this decision has been challenged so far in four cases in district courts and three cases at the appellate level.

REASONS FOR GRANTING THE WRIT

The decision below not only found a federal statute unconstitutional, but invalidated the composition of the federal agency Congress vested with exclusive jurisdiction for the administration and civil enforcement of the Federal Election Campaign Act of 1971, as amended,[5] 2 U.S.C. §§ 431-455, and the statutes governing public financing of presidential election campaigns, 26 U.S.C. §§ 9001-9042. The rationale for this decision was an expansive view of the Constitution's separation-of-powers requirement, that, as the court below candidly conceded (App. 15a), goes beyond anything sanctioned by this Court.[6] Moreover, as we show *infra*, pp. 18-19, two other circuits have rejected the position adopted below that the Constitution prohibits giving an agent of Congress a statutory role carrying the potential to influence, but not to control or overrule, executive decisionmakers.

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[5] See *supra*, n.1.

[6] In 1988 Congress eliminated most of this Court's mandatory appellate jurisdiction, *see* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988), on the understanding that "[u]nder usual circumstances, any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H.R. Rep. No. 100-660, 100th Cong., 2d Sess. 9 (1988).

In addition, even if the court's constitutional holding were correct, its failure to affirm the *de facto* validity of the Commission's actions in administering these laws for almost two decades prior to this decision conflicts with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976). It also imperils unnecessarily the current enforcement of the federal campaign finance statutes, which this Court has previously found to serve the compelling public interests in deterring corruption of elected officials and preserving the integrity of the federal election process. Such a decision should not be allowed to stand without plenary review by this Court.

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

While this Court has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches," the Court has "never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)). To the contrary, the "principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

What the Constitution mandates is not "a hermetic division between the Branches," but a "'safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Mistretta*, 488 U.S. at 381-82 (quoting *Buckley v. Valeo*, 424 U.S. at 122). Thus, the Court has "invalidated attempts

by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch" but has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Id.*

The inclusion of the *ex officio* members on the Federal Election Commission does not violate this principle because the statute vests them with no authority to determine how the Commission exercises any part of its executive powers. Following this Court's decision in *Buckley v. Valeo*, 424 U.S. at 109-141, that the appointment of the voting Commissioners by Congress was unconstitutional, Congress amended the Act to provide that all six members of the Commission authorized to vote on the exercise of its powers must be nominated by the President and confirmed by the Senate in accord with the Constitution's Appointments Clause, art. II, § 2, cl. 2. 2 U.S.C. § 437c(a)(1). Congress went to great lengths to specify that the power to administer and enforce the Act is vested exclusively in these six Commissioners appointed by the President. The statute explicitly provides that the *ex officio* members are "without the right to vote," 2 U.S.C. § 437c(a)(1), and requires that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." 2 U.S.C. § 437c(c).[7] The statute also specifies that a Commis-

[7] The statute reemphasizes this restriction on the exercise of the Commission's civil law enforcement powers. *See* 2 U.S.C. § 437g(a)(2), (4), (6).

sioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act," 2 U.S.C. § 437c(c). By so carefully reserving all authority to the six Commissioners appointed by the President, the Act effectively precludes the *ex officio* members from controlling, or even participating in, the exercise of the Commission's executive powers.[8]

The only authority the statute gives the *ex officio* members is to express their views to the voting Commissioners during Commission meetings. The voting Commissioners are, however, free to disregard the advice of the *ex officio* members with impunity and to cast their votes to exercise the Commission's powers as they see fit. The statute thus gives the *ex officio* members no ability to interfere in any way in the exercise of the Commission's powers by the six Commissioners appointed by the President.

The court of appeals conceded that this Court has only found the separation-of-powers doctrine violated when Congress or its agents "possessed explicit voting or decisionmaking power that is not present here" (App. 15a). It proceeded nevertheless to rule that the statute's denial of any power over executive action to the *ex officio* members is insufficient to

[8] The Act also prohibits the *ex officio* members from serving as chairman or vice chairman, 2 U.S.C. § 437c(a)(5), and under the Commission's procedural rules they are denied the rights to call a meeting, to vote either to adjourn or to select a presiding officer in the absence of the chairman, or even to be counted in determining a quorum. See Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

satisfy the Constitution because the voting Commissioners might be influenced in their decisions by the views of the *ex officio* members:

> Even if the *ex officio* members were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners.

(App. 13a-14a.) The court did not identify what this tacit message might be or how it might interfere with the voting Commissioners' ability to exercise their executive powers as they see fit.

In contrast to the court of appeals, this Court has consistently applied the "separation of powers" doctrine, as its name suggests, solely as a restriction on the distribution of governmental *power* within our constitutional system. In each case, this Court has found it necessary to analyze carefully the nature of the legal powers conferred upon the Congress or its agents by a statute alleged to violate the separation-of-powers principle.[9] This Court has never viewed

[9] *See, e.g., Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S.Ct. 2298, 2312 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it"); *Morrison v. Olson*, 487 U.S. at 694 ("Congress retained for itself no powers of control or supervision over an independent counsel"); *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) ("[B]ecause Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers"); *Buckley v.*

this principle as a restriction on statutory opportunities for members of one branch to influence another branch's exercise of its own constitutional powers by the mere conveying of messages, tacit or otherwise. Indeed, this Court has twice applied separation-of-powers analysis to federal commissions, including the Federal Election Commission, with *ex officio* members from another branch, but has never found the inclusion of *ex officio* members relevant to the constitutional question. *Buckley v. Valeo*, 424 U.S. at 113 (The Commission "consists of eight members" including two "*ex officio* members without the right to vote") and at 137 ("the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners"); *Mistretta*, 488 U.S. at 368 ("The Attorney General, or his designee, is an *ex officio* non-voting member" of the Sentencing Commission).

In sum, the separation-of-powers doctrine does not authorize courts to invalidate statutes out of a general wariness of Congress's ability to " 'mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments' " (App. 15a, quoting *The Federalist* No. 48, at 334 (J. Madison) (J. Cooke ed. 1961)). What the separation-of-powers doctrine requires is not that decisionmakers in each branch must be insulated from being influenced by views expressed by members of another branch, but that " 'each of the three general departments of government [must remain] entirely free from the *control* or *coercive influence*, direct or in-

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Valeo, 424 U.S. at 137 ("[T]he ultimate question is which, if any, of [the Federal Election Commission's] powers may be exercised by the present voting Commissioners").

direct, of either of the others,' " *Mistretta*, 488 U.S. at 380 (emphasis added, quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." . . . And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S.Ct. 2298, 2311 (1991) (citations omitted). The Act violates neither of these constraints. There is no contention that Congress has exercised its legislative power through the *ex officio* members of the Commission, and we have shown above—and the court of appeals agreed—that Congress did not vest the *ex officio* members with any executive power. Under this Court's precedents, that is enough to satisfy the Constitution.[10]

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[10] As Assistant Attorney General in 1976, Justice Scalia cited the separation-of-powers doctrine in testifying in support of the Ford Administration's opposition to retaining the *ex officio* members when the Commission was reconstituted following this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess. 103, 119, 135, 137 (1976), *reprinted in* FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 109, 125, 141, 143 (1977). As shown in the text, however, this Court's later precedents have

Two other courts of appeals have rejected the view adopted by the court below that the Constitution is violated by a statute providing an agent of Congress with an opportunity to influence, but not to control or overrule, executive decisionmakers. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1106-1108 (9th Cir. 1988), *rev'd on a different issue*, 893 F.2d 205 (9th Cir. 1989) (en banc), and *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), involved challenges under the separation-of-powers doctrine to the provision in the Competition in Contracting Act of 1984 ("CICA"), 31 U.S.C. §§ 3551-56, authorizing the Comptroller General, an agent of Congress, to issue formal recommendations to executive agencies on the disposition of protests by disappointed bidders for federal contracts. To ensure that the Comptroller General has an adequate opportunity to investigate and make a recommendation before a final decision, CICA imposes an automatic stay of any contract award once a bid protest is lodged. 31 U.S.C. § 3553(c)(1), (d)(1).

Both courts concluded that the separation-of-powers doctrine is not violated by a statute that only requires executive decisionmakers to consider, but not to accept, the Comptroller General's views. In the Ninth Circuit's view, "the critical issue is whether Congress or its agent seeks to *control* (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process . . . . If Congress 'in effect has retained control,' its action and the statutory provision on which it is based is unconstitutional." *Lear*

adopted a separation-of-powers test inconsistent with the approach suggested in this testimony almost two decades ago.

Siegler, 842 F.2d at 1108 (emphasis in original). The Third Circuit similarly concluded that "Congress has the authority" to permit an agent of the legislature "to influence the executive's execution of the laws through the powers of public illumination and persuasion." *Ameron*, 809 F.2d at 993. Emphasizing that under CICA executive decisionmakers are "free to refuse to implement any and all of the Comptroller General's recommendations" and that the statute leaves "final control over procurement decisions to the executive," 809 F.2d at 995, 998, the Third Circuit concluded, *id.* at 998:

> Like other political mechanisms built on the basis of the doctrine of separation of powers, CICA encourages the branches to work together without enabling either branch to bind or compel the other. That is the way a government of divided and separated powers is supposed to work.

We submit that the Third and Ninth Circuits have construed this Court's separation-of-powers jurisprudence correctly, and that the court below was wrong in its admittedly unprecedented extension of the doctrine to bar Congress from placing its agents in a position to try to exert persuasive influence upon, but not to bind or control, the actions of executive decisionmakers.[11] But regardless of which view this

[11] There are, of course, instances when congressional attempts to influence executive administrators can exceed lawful bounds, but the courts have required substantial proof of improper pressure on a decisionmaker and of prejudice in a particular case before relief will be provided. *See, e.g., DCP Farms v. Yeutter*, 957 F.2d 1183, 1187-88 (5th Cir.), *cert. denied*, 113 S. Ct. 406 (1992), and cases discussed therein; *Chemung County v. Dole*, 804 F.2d 216, 221-222 (2d Cir. 1986). As the district court emphasized (App. 26a), NRA

Court ultimately adopts, there can be no doubt that this novel extension of constitutional law to invalidate the structure of an independent agency established by Congress to administer statutes designed to protect the integrity of the federal electoral system is of sufficient national importance to warrant review by this Court.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

The court of appeals found (App. 17a, 16a) that "the unconstitutional *ex officio* membership provision can be severed from the rest of" the Act, so that "Congress is not even required after our decision . . . to amend the statute" in order to provide for the continuing administration of the Act by a reformed Commission. The court acknowledged that in *Buckley v. Valeo*, 424 U.S. at 142, this Court found the Commission's past actions to be *de facto* valid even though it had invalidated the Commission's structure on separation-of-powers grounds. The court of appeals decided nonetheless simply to reverse the district court's judgment against NRA without regard to the merits because the court was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (App. 18a). Even if this Court affirms the finding of the court of appeals that the inclusion of *ex officio* members on the Commission is unconstitutional, the Court should

did not even try to make such a showing in this case. Indeed, there was nothing in the record before the court of appeals in this case indicating whether the *ex officio* members participated in, or were even present during, agency deliberations.

reaffirm its holding in *Buckley* and accord *de facto* validity to the Commission's actions in administering and enforcing the campaign finance statutes for almost two decades prior to this decision, pursuant to the explicit authorization of the Act. This would permit a reformed Commission to pick up where the old Commission left off in the orderly administration and enforcement of these important statutes.

As the court of appeals recognized (App. 17a), this Court's affirmance of the *de facto* validity of the Commission's actions in *Buckley*, 424 U.S. at 142, even after ruling that the Commission would have to be changed to conform with the Constitution if it was to continue in operation beyond a brief transition period, was a reflection of the *de facto* officer doctrine long recognized by this Court. Under that doctrine, " 'where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)).[12] *See also, e.g., United States v. Royer*, 268 U.S. 394, 397 (1925); *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981); *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934

[12] The Court ultimately declined to apply the *de facto* officer doctrine in *Glidden* because it involved a challenge to the appointment of the judge, and thus affected the validity of the judgment under review. 370 U.S. at 536. There is no constitutional challenge here to either the structure or the jurisdiction of the district court that entered judgment against NRA.

F.2d 1127, 1150 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992). Even though four of the six *voting* members of the original Commission had been appointed by members of Congress, *Buckley*, 424 U.S. at 113, this Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. In fact, the Court went even further, finding that uninterrupted enforcement of the federal election campaign finance statutes was important enough to warrant permitting the Commission to continue to act *de facto* for a short period during which Congress could reconstitute the agency. "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission to function *de facto* in accordance with the substantive provisions of the Act." *Buckley*, 424 U.S. at 143. When Congress reconstituted the Commission after the *Buckley* decision, it effectively incorporated this Court ruling into the legislation.[13]

[13] "All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act . . . shall continue in effect to the same extent as if such transfer had not occurred." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(g)(3), 90 Stat. 475, 477 (May 11, 1976). The legislation also provided that pending litigation in which the Commission was a party "shall not abate" as a result of the reconstitution of the Commission. *Id.*, sec. 101(g)(5).

There is no legitimate reason why the same result should not obtain here. Initially, the court of appeals' view that the *de facto* officer doctrine should be disregarded whenever necessary to reach a constitutional issue (App. 17a n.6) is contrary to the "deeply rooted" doctrine that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). *Accord, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).[14] However, the court's felt need to provide some relief in order to justify reaching the constitutional issue can be satisfied without denying the Commission's past actions *de facto* validity. The only constitutional interest of the respondents here is in having the law enforced against them at the behest of an agency whose composition conforms to the Constitution; they have no constitutional right to be relieved of liability for the substantial violations of law the district court found they committed. Thus, the only relief to which they are even arguably entitled is restricting the Commission from proceeding with its law enforcement suit unless and until it is

[14] The court of appeals was clearly wrong in its supposition that if an allegation that the Commission's composition violates the separation-of-powers requirement were not treated as a valid defense to a civil law enforcement suit, this "would foreclose any challenge to the authority of public officers" (App. 17a n.6). Congress included in the Act a special provision for the litigation of such constitutional challenges in declaratory judgment actions, 2 U.S.C. § 437h, and it was pursuant to that provision that this Court invalidated the composition of the original Commission in *Buckley v. Valeo*.

reconstituted in accordance with the Constitution. If a reconstituted Commission determines to proceed with this civil law enforcement suit against the respondents, they would have no remaining constitutional right to avoid entry of judgment against them.[15]

Such a procedure would provide respondents with all the relief necessary to protect their claimed constitutional rights, but would not allow them to escape liability for violating the Act. It would also permit the Commission to continue to administer and enforce the Act in an orderly manner with respect to NRA and other alleged violators, after being reconstituted to satisfy any constitutional requirements, as this Court found appropriate in *Buckley*, 424 U.S. at 142-43.[16]

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[15] "A governmental body 'may effectively ratify what it could theretofore have lawfully authorized.'" *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989); *see also Bowles v. Wheeler*, 152 F.2d 34, 40 (9th Cir.), *cert. denied*, 326 U.S. 775 (1945) ("[I]t appears settled law that 'the unauthorized bringing of an action may * * * be ratified by the person in whose name and on whose account it was brought so as to sustain the action from the beginning'" (citation omitted)); *Wirtz v. Atlantic States Construction Co.*, 357 F.2d 442, 446 (5th Cir. 1966); *Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987).

[16] Nothing in *Harper v. Virginia Dep't of Transportation*, 113 S. Ct. 2510 (1993), forecloses this limited remedy. *Harper* would require that a finding by this Court that inclusion of the *ex officio* members on the Commission violates the Constitution be applied in all other pending cases in which the issue is not procedurally barred. It would not preclude the Court from also applying the *de facto* officer doctrine to limit the remedy in this case, and then limiting the remedy available to others in similar circumstances in the same way.

"The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." *EEOC v. Sears*, 650 F.2d at 17. Application of the doctrine is particularly appropriate here because, unlike the situation in *Buckley*, *see* p. 22, *supra*, all of the Commisioners that have voted on the Commission's executive actions since 1976 have been *de jure* officers, appointed to office in accord with the Constitution; the only constitutional defect found here was the presence of two additional individuals when the voting Commissioners made their decisions. Such circumstances, which are comparatively peripheral to the exercise of statutory authority by the six voting Commissioners whose appointments unquestionably satisfy the Constitution, should not be permitted to disrupt the orderly enforcement of statutes protecting the integrity of federal elections. Accordingly, even if the Court were to affirm the lower court's constitutional determination, the protection of the public interest in the uninterrupted enforcement of the federal campaign finance laws warrants this Court's review of the court's failure to affirm the *de facto* validity of the Commission's actions in administering these laws up to now.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 1, 1993 Decided October 22, 1993

No. 91-5360

FEDERAL ELECTION COMMISSION

v.

NRA POLITICAL VICTORY FUND, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(90cv0309)

Charles J. Cooper, with whom *Michael A. Carvin*, *Robert J. Cynkar*, and *Elisabeth T. Roth* were on the brief, for appellants.

Richard B. Bader, Associate General Counsel, Federal Election Commission, with whom *Lawrence M. Noble*, General Counsel, and *Marcus C. Migliore*, Attorney, Federal Election Commission, were on the brief, for appellee.

Before: WALD, RUTH B. GINSBURG,* and SILBERMAN, *Circuit Judges*.

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* Former Circuit Judge Ruth B. Ginsburg, now an Associate Justice of the Supreme Court of the United States, was a member of the panel when the case was argued but did not participate in this opinion.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* This enforcement action by the Federal Election Commission concerns a transfer of $415,744.72 from the National Rifle Association Institute for Legislative Action (NRA-ILA) to its political action committee, the NRA Political Victory Fund (PVF). The district court held that the transfer was a "contribution" prohibited by the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.* (1988), and rejected appellants' various constitutional arguments based on the First Amendment and separation of powers.

We believe that the Commission lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers. Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members. We therefore reverse.

I.

In March and July of 1988, PVF sent a letter to all NRA members soliciting funds to finance its activities in the upcoming November elections. The cost of the two mailings totalled $415,744.72. NRA-ILA paid the vendors the full amount on behalf of PVF. On August 1, 1988, PVF reimbursed NRA-ILA for these payments, an action it soon regretted because of a shortfall in PVF's operating budget. Accordingly, on October 20, 1988, NRA-ILA wrote a check to PVF to return the reimbursement. In the final

weeks before the fall elections, PVF used its funds, which included the $415,744.72, to make independent expenditures (such as television or print advertisements) on behalf of candidates and to contribute directly to political campaigns.

The Commission does not challenge the propriety of the first two transactions. NRA-ILA's initial payments to vendors fall within section 441b(2)(2)(C), which permits a corporation to pay for the expenses of its political action committee in connection with direct solicitation of members. 2 U.S.C. § 441b(b)(2)(C) (1988). PVF's reimbursement to NRA-ILA is lawful because FECA does not restrict the flow of money from a political action committee to its parent corporation.

The Commission, however, notified appellants in October 1989 that it had reason to believe that the third transaction violated 2 U.S.C. § 441b(a) (1988), which prohibits corporate contributions and expenditures in connection with federal elections. Appellants disagreed and argued that the Commission had improperly considered the third transfer as if it were isolated from the two prior transactions. When statutorily mandated negotiations failed in late 1990, the Commission brought this civil enforcement action, *see* 2 U.S.C. § 437g(a)(6)(A) (1988), against NRA-ILA for making the illegal contribution, PVF for accepting it, and Grant A. Wills for facilitating it as Treasurer of PVF. *See* 2 U.S.C. § 441b(a) (1988).

Both sides moved for summary judgment. Appellants argued that the transaction did not violate section 441b(a), that the Commission lacked authority to act against them because certain features of

the operation and composition of the Commission violate separation of powers principles, and that the transaction was protected by the First Amendment under the Supreme Court's decision in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The district court determined that the October 20, 1988, transfer was a "contribution" in violation of section 441b(a). The court held that appellants' separation of powers arguments were non-justiciable and rejected their First Amendment claims. The court imposed a civil penalty equal to the Commission's cost of investigating and prosecuting the action, and enjoined appellants from similar transfers in the future. *See Federal Election Comm'n v. NRA Political Victory Fund*, 778 F. Supp. 62 (D.D.C. 1991). Appellants essentially repeat their arguments on appeal, contending that the district court erred in deciding each of their claims.

II.

Because we hold that the composition of the Commission violates separation of powers, we do not pass on appellants' arguments based on the First Amendment as well as those turning on statutory interpretation. Although courts should "'refrain from passing on the constitutionality of an act of Congress unless obliged to do so,'" *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)), we note that in this unusual circumstance we need not find a violation of section 441b before addressing the separation of powers claim. The Supreme Court in similar situations—

when plaintiffs challenged the constitutional composition or character of a tribunal—determined the constitutional status issue without reaching the merits.[1] *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986) (upholding constitutionality of CFTC's authority to adjudicate common law counterclaims without passing on the merits of the counterclaim); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982) (holding that the bankruptcy courts' jurisdiction to adjudicate common law claims violated Article III without deciding the claims).[2]

Appellants claim that the composition of the Commission, particularly its two *ex officio* members, violates the Constitution's separation of powers. In 1974, Congress amended FECA to create the Commission and charged it with administering the Act. The Commission then, as now, had eight members; the Secretary of the Senate and the Clerk of the House of Representatives (non-voting and *ex officio*), and six voting members whom Congress played varying roles in appointing. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held, *inter alia*, that the limitations Congress placed on the President's power to nominate voting members of the Commission violated the Appointments Clause. Although the Court mentioned the *ex officio* members,

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[1] In any event, the statutory issue is intertwined with the First Amendment concerns.

[2] We note, however, that the Court did not explicitly address whether it ought to decide the constitutional question before addressing the merits of the underlying common law claims in these cases.

see id. at 113, it never discussed the constitutionality of their status.

After *Buckley*, Congress reconstituted the Commission as follows:

> The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

2 U.S.C. § 437c(a)(1) (1988).

It is argued that the reconstituted Commission still violates separation of powers principles in several respects. First, appellants urge that FECA's requirement that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," 2 U.S.C. § 437c(a)(1) (1988), impermissibly limits the President's nomination power under the Appointments Clause. Second, appellants maintain that the President does not exercise sufficient control over the Commission's civil enforcement authority, a core executive function, to satisfy the constitutional mandate that he "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. And finally, they assert that Congress exceeded its Article I authority by placing the Secretary and the Clerk on the Commission as *ex officio* members.

The Commission claims that appellants lack standing to raise the separation of powers claims. As has

so often been said, standing requires a showing of (1) an injury in fact that is (2) fairly traceable to allegedly unlawful government action and (3) redressable by the requested relief. *See Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2306 (1991) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This case does not raise the first and last of these requirements; civil sanctions are injuries in fact, and vacating the order imposing the sanctions redresses the injuries. The district court held, however, that appellants' injury is not "fairly traceable" to (caused by) the alleged constitutional defects of the Commission because appellants did not allege that the outcome of the Commission's decisionmaking process would have been different if it were composed differently.

We think the district court's conclusion was erroneous at least with respect to appellants' last two separation of powers arguments—that the independence of the Commission frustrates the President's executive power and that the *ex officio* members unconstitutionally serve on the Commission. A litigant "is not required to show that he has received less favorable treatment than he would have if the agency were lawfully constituted and otherwise authorized to discharge its functions." *Committee for Monetary Reform v. Board of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985) (citation omitted); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) ("The claim advanced by the petitioners, that they were denied the protection of [Article III] judges . . . has nothing to do with the manner in which either of these judges conducted

himself in these proceedings. . . ."); *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984) (noting that litigants could "rarely or never" show that "if the government had operated in accord with [the Constitution], it would not have taken adverse action against them"). Instead, litigants need only demonstrate that they have been "directly subject to the authority of the agency." *Committee for Monetary Reform*, 766 F.2d at 543. Thus, in *Committee for Monetary Reform*, we denied standing to the plaintiff-appellants, private businesses and individuals who alleged that agency policy caused injurious monetary instability and high interest rates, because the agency "in no way exercise[s] direct governmental authority over the appellants." *Id.* at 544. Because an enforcement action is the paradigm of "direct governmental authority," appellants have standing to raise their arguments based on the Take Care Clause and Article I.

We agree with the district court, although using a different analysis, that appellants' challenge to the alleged restriction on the President's appointment power to select more than three commissioners from one party is not justiciable. Congressional limitations—even the placement of burdens—on the President's appointment power may raise serious constitutional questions. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466-67 (1989). But it is impossible to determine in this case whether the *statute* actually limited the President's appointment power. Appellants do not argue, nor can we assume, that the President wished to appoint more than three members of one party and was restrained by FECA from doing so. Presidents have often

viewed restrictions on their appointment power not to be legally binding. *See, e.g., Statement on Signing the Cranston-Gonzales National Affordable Housing Act*, 26 WEEKLY COMP. PRES. DOC. 1930, 1931 (Nov. 28, 1990) (Congressional limitations "do not constrain the President's constitutional authority to appoint officers of the United States."); *Statement on Signing the National and Community Service Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1833, 1834 (Nov. 16, 1990); *Statement on Signing the Intelligence Authorization Act*, Fiscal Year 1990, 25 WEEKLY COMP. PRES. DOC. 1851, 1852 (Nov. 30, 1991). Of course, such legislation may impose political restraints. Particularly with respect to the Commission—for which, because of the sensitive political nature of its work, an equal number of members from each party was contemplated, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1982) (noting that the Commission is "inherently bipartisan" and that "it must decide issues charged with dynamics of party politics"); H.R. REP. No. 917, 94th Cong., 2d Sess. 3 (1976) ("It is therefore essential in this sensitive area [of campaign regulation] that the system of administration and enforcement enacted into law does not provide room for partisan misuse . . . .")—it is hard to imagine that the President would wish to alter that balance, even if the understanding had not been reflected in the statutory language. More important, as appellants recognize, under its Advice and Consent authority the Senate may reject or approve the President's nominees for whatever reason it deems proper. Since all commissioners must be confirmed by the Senate, it would seem that a Senate resolution or even an informal communication to the

President would have the same effect as the statute. It is not the law, therefore, which arguably restrains the President, but his perception of the present Senate's view as it may be assumed to be reflected in the statute.

Superficially, appellants' claim here may appear to be analogous to its other challenges to the Commission's authority, concerning which we hold that they need not show that the Commission would have acted differently if it were constitutionally composed. *See supra* at 6-7. But these questions—whether the Commission is independent of the President because he cannot remove the commissioners and whether the *ex officio* members are present during the Commission's deliberations—have some impact (even though the extent of which may be impossible to measure) on how the Commission decides matters before it. *See Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) ("'[I]t is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.'") (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2312 (1991) (holding unconstitutional a board of review comprised of members of Congress with veto power over certain executive functions, even though the statutory scheme "might prove to be innocuous"). We cannot assume, however, that the bipartisanship requirement has any effect on the Commission's work, for without the statute the President could have appointed exactly the same members. For appellants to

prevail we would have to conclude that *all* the Commission's appointments were invalid because infected by the statute. Appellants do not allege that FECA affected the President's choice with respect to any particular nomination to the Commission, so the constitutional status of all six commissioners is indistinguishable. If FECA is to be thought to have tainted any nomination, it tainted all.[3] Accordingly, in order to redress appellants' alleged injuries in this case, we must assume, without any factual support, that each of the commissioners would not have been appointed but for the statute. That we cannot do. It may well be that only if the President appoints and the Senate confirms a fourth same-party member to the Commission could the unconstitutionality of the bipartisanship requirement be regarded as justiciable, when the government raises it as a defense to the charge that the member's participation violates FECA.[4]

Although appellants have standing to assert that the Commission acts unconstitutionally because of its independence of the President in its law enforcement activities, there is not much vitality to the claim after *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison*, which held constitutional the independent counsel authorized by the Ethics in Government Act, approved a much greater diminution of presidential authority than presented in this case. The Commission is patterned on the classic independent regulatory agency sanctioned long before *Morrison* in

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[3] We could hardly hold only the appointments of commissioners appointed by a President of the opposite party invalid.

[4] Perhaps the President could challenge the constitutionality of the law by alleging that the statute impinged on his appointment power with respect to a particular nomination.

Humphrey's Executor v. United States, 295 U.S. 602 (1935). Although *Morrison* reconsidered the rationale of *Humphrey's Executor*, *see Morrison*, 487 U.S. at 689-90, it was certainly not for the purpose of expanding presidential power; the independent counsel, after all, exercised power previously possessed by the Justice Department, power that had been thought to be a traditional executive function. *See United States v. Nixon*, 418 U.S. 683, 693 (1974); *INS v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting); *Committee for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Appellants would distinguish *Morrison* on the grounds that the Act explicitly empowered the Attorney General (hence the President) to remove an independent counsel for "good cause." Here the statute is silent as to the President's removal authority, and therefore appellants argue that he has none. However, statutory silence could imply that the President actually enjoys an unrestricted power of removal. *See Shurtleff v. United States*, 189 U.S. 311, 316 (1903). The Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms. We think the Commission is likely correct, but, in any event, we can safely assume that the President would at minimum have authority to discharge a commissioner for good cause—if for no other. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (recognizing the President's authority to remove SEC members for good cause despite governing statute's silence).

* * * *

We turn now to appellants' more substantial claim. It is undisputed that both *ex officio* members are appointed by and are agents of Congress, and it is also settled that Congress may not appoint the voting members of this Commission or, indeed, any agency with executive powers. *See Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 139-141 (1976). There remains only the question whether *ex officio* non-voting members enjoy a different status for purposes of constitutional analysis.

The Commission would have us conclude that the *ex officio* members are constitutionally harmless. Non-voting members cannot serve as chairman, cannot call or adjourn a meeting, and are not counted in determining a quorum. In short, we are told that the *ex officio* members have no *actual* influence on agency decisionmaking. If that were so, congressional intent as reflected in the legislative history would seem frustrated. At least certain members of Congress clearly intended that the appointed officers serve its interests while serving as commissioners. *See* 122 CONG. REC. 6706 (1976) (statement of Senator Mansfield) (agreeing that "as an ex officio member, [the Secretary] would not just remain mute, that he could give advice and consent, that he could, in effect, represent the Senate's point of view"); *id.* (statement of Senator Cannon) (agreeing with Senator Mansfield with respect to campaign finance matters "as related to the Senate").

Legislative history aside, we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence. Even if the *ex officio* members were to remain

completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners. Federal law recognizes in other contexts that non-voting participation can influence a decisionmaking process. For example, FED. R. CRIM. P. 24(c) states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." An alternate juror, of course, does not have a right to vote. The rationale animating this rule is that "[w]hen alternate jurors are present during the deliberations, the possible prejudice is that defendants are being tried not by a jury of 12, as is their right, but by a larger group." *United States v. Jones*, 763 F.2d 518, 523 (2d Cir.), *cert. denied*, 474 U.S. 981 (1985) (citations omitted).

In *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298 (1991) ("*MWAA*"), the Supreme Court held unconstitutional a board of review composed entirely of members of Congress that had veto power over the decisions of regional airports authority. In so doing, the Court recognized that the "unique" arrangement "might prove innocuous." *Id.* at 2312. The Court invalidated the law, however, because "the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role." *Id.* The Court recalled that the Framers recognized that "power is of an encroaching nature," THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961),

and therefore the Constitution imposes a structural ban on legislative intrusions into other governmental functions. *See MWAA*, 111 S. Ct. at 2310. It is true that the Court has not considered the circumstances of this case; the members of Congress in *MWAA* and the Comptroller General in *Bowsher v. Synar*, 478 U.S. 714 (1986), possessed explicit voting or decisionmaking power that is not present here. However, since "the legislature 'can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments,'" *id.* at 2310-11 (quoting THE FEDERALIST NO. 48, at 334), the mere presence of agents of Congress on an entity with executive powers offends the Constitution.

To be sure, as the Court has said often, the Constitution does not require a "hermetic sealing off of the three branches of Government." *Buckley*, 424 U.S. at 121. The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and it 'anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere "informational or advisory role" in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. *MWAA*, 111 S. Ct. at 2311-12. In that capacity, Congress

enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission.[5] What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

III.

There remains the question of remedy. We need not concern ourselves with the effect of our opinion on the whole statute because FECA contains an explicit severability clause. *See* 2 U.S.C. § 454 ("If any provision of this Act . . . is held invalid, the validity of the remainder of the Act . . . shall not be affected thereby."). That clause raises a presumption that Congress would wish the offending portion of the statute—creating the *ex officio* members of the Commission—to be severed from the rest. And the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 108-09, 140 (1976), relying on that presumption, invalidated and severed a much greater portion of the statute—including, of course, the composition of the Commission. Indeed, Congress is not even required after our decision, as it was after *Buckley*, to amend the statute. Since what remains of FECA is not "unworkable and inequitable," *id.* at 252 (Burger,

[5] *But see Pillsbury Co. v. FTC*, 354 F.2d 952, 964-65 (5th Cir. 1966) (holding that Senate subcommittee proceedings where commissioners were questioned about their conduct in a specific case deprived the defendant corporation of due process).

C.J., concurring in part and dissenting in part), the unconstitutional *ex officio* membership provision can be severed from the rest of FECA.

The Commission asserts that, regardless of the constitutionality of the *ex officio* membership provision, we should not provide a remedy to appellants because under the *de facto* officer doctrine the enforcement actions of the Commission cannot be challenged.[6] Under that doctrine " 'where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.' " *Glidden Co. v. Żdanok*, 370 U.S. 530, 535 (1962) (plurality opinion of Harlan, J.) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)). The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) relied on this theory (although without explicitly citing to the *de facto* officer doctrine) to validate the Commission's past actions. But the relief sought by the plaintiffs there, declaratory and injunctive remedies, *see id.* at 9, could have purely prospective impact. Here, by contrast, appellants raise the constitutional challenge as a defense to an

[6] The Commission actually raises the *de facto* officer doctrine as an argument against justiciability, asserting that our inability to grant relief renders a decision purely advisory. This circular argument would foreclose any challenge to the authority of public officers, an effect that the *de facto* officer doctrine does not sanction. *See Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) ("[T]he court should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable.").

enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case. The Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982), declared an aspect of the bankruptcy law unconstitutional and stated that its opinion would act prospectively. Still, the party who challenged the constitutionality of the statute was afforded relief. *See id.* at 87 n.40. And the Court relied exclusively on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to limit the retroactive effect of its decision. *Chevron Oil* was recently rejected by the Court in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993).

* * * *

For the foregoing reasons, the judgment of the district court is hereby reversed.

So Ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND, *et al.*, DEFENDANT.

MEMORANDUM OPINION

[Filed Nov. 15, 1991]

The plaintiff filed this suit on December 20, 1990 seeking a declaration that defendants had violated the federal campaign finance laws and an assessment of civil penalties against the defendants. Defendants answered and denied that there had been any violation. Cross motions for summary judgment were filed several months later, and oral argument was heard on September 20, 1991. No genuine issue of material fact remains in dispute, therefore this case is appropriate for summary judgment.

I. *The Disputed Transaction*

There are three defendants in this suit: the National Rifle Association—Institute for Legislative Action, the NRA Political Victory Fund, and Grant

Wills, Treasurer of the NRA Political Victory Fund. The National Rifle Association—Institute for Legislative Action (hereinafter "ILA") is a component of one overall organization, the National Rifle Association. The ILA is not separately incorporated from the NRA but it does have its own separate bank accounts and its own fund-raising system. The NRA Political Victory Fund (hereinafter "PVF") is a separate corporate entity. It is a segregated fund, meeting the qualifications of 2 U.S.C. § 441(b)(2)(C).

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455, prohibits corporations from contributing to campaigns or making campaign-related expenditures. *See* 2 U.S.C. § 441b(a). This prohibition encompasses contributions made by a corporation to a segregated fund established for the purpose of supporting political campaigns. However, corporations are allowed to pay for the costs of soliciting contributions to a segregated fund either by paying directly or by later reimbursing the fund. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). If the segregated fund pays the solicitation expenses initially and is later reimbursed by the corporation, reimbursement must occur "no later than thirty calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3).

The transaction which gave rise to the dispute in this case went as follows. The ILA dispatched two mailings to raise money for the PVF, one in March of 1988 and one in July of 1988. The ILA spent a total of $415,744.72 on these mailings. This payment was entirely legal since corporations may pay for the solicitation expenses of the segregated fund. Then on August 1, 1988, the PVF reimbursed the ILA for its

expenditures, remitting to it exactly $415,744.72. This payment was also legally permissible since a segregated fund can pay for its own solicitation expenses. Then on October 20, 1988, the ILA gave the exact same amount, $415,744.72, back to the PVF. The October 20 payment is the object of the controversy in this case.

The defendants claim that the October 20 payment was a legally permissible reimbursement of solicitation expenses to the PVF. The FEC disagrees and claims that the October 20 payment is not a reimbursement but a direct corporate contribution. The FEC argues that the payment cannot qualify as a permissible reimbursement because it was made 81 days after the PVF outlay which it was supposedly reimbursing.

The defendants also argue that if the October 20 payment is deemed a contribution, it was nonetheless legally permissible under the rule of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (hereinafter "*MCFL*"). In *MCFL* the Supreme Court held that it was an unconstitutional restriction on First Amendment rights to prohibit a nonprofit organiaztion that received no contributions from corporations or labor unions from producing a pre-election newsletter that flagged candidates' views on abortion. The Court noted that restrictions on corporate independent expenditures were intended to prevent the wealth amassed for business purposes in corporate treasuries from being spent contrary to shareholder interests or being used to unduly influence elections. In the Court's view, that risk did not arise in the particular arrangement MCFL had.

The FEC rejects the application of the *MCFL* decision to the ILA, claiming that the holding of *MCFL* is limited to a small class of independent expenditures and does not apply to the contribution made in this case.

The Court will now proceed to address these arguments.

II. *The Violation*

To begin, the Court finds that the October 20 payment from the ILA to the PVF violated the FECA. First of all, it does not qualify as a reimbursement for solicitation expenses. Although defendants claim that they simply changed their minds and for fiscal reasons wanted to have the ILA bear the cost of the solicitation as it originally had,[1] the motivation for making the payment does not render it lawful. There must be a time at which a transaction is closed. Defendants cannot be allowed to keep their books open forever so that they can transfer funds between the two entities at will. The FEC has promulgated regulations through the appropriate notice and comment rulemaking procedure which set a 30-day time limit on reimbursements for solicitation expenses. *See* 11 C.F.R. § 114.5(b)(3). The regulations provide a reasonable window of time for transferring funds in the event that there has been an accounting error or that the decision is made to shift the burden of solicitation expenses. There is no legal basis for ignoring

[1] Defendants state that some time after August 1 they realized that the PVF needed more funds than they had projected at the time the PVF reimbursed the ILA for the solicitation expenses. Hence, they caused the October 20 payment to be made. *See* Wills Affidavit, ¶ 28.

or overturning this regulation. Hence, as a matter of law, the October 20 payment to the PVF from the ILA cannot qualify as a reimbursement for solicitation expenses under 2 U.S.C. § 441b(b)(2)(C).

Moving now to defendants' second argument, the Court finds that the October 20 payment was a contribution and was not of the kind permitted under *MCFL*. *MCFL* permits some nonprofit corporations to make independent expenditures in connection with federal election campaigns where there is no risk that sizeable corporate treasuries will be used to unduly influence elections. Massachusetts Citizens for Life had a policy of not accepting contributions from business corporations or labor unions. Defendants here say in their pleadings that although the amounts are small, the ILA does receive corporate contributions. Nowhere do defendants state a policy equivalent to that of MCFL. Hence the defendants do not fit in the group of organizations affected by the *MCFL* holding, a group which the Court acknowledged at the time of its decision would be "small." 479 U.S. at 264.

Much as defendants struggle to characterize the October 20 payment as actually paying for solicitation material purchased in March and July, that's not where the money went. The ILA made a contribution to the PVF intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates. By defendants' own account at argument, the October 20 payment returned money to PVF originally taken from PVF to correct for inaccurate financial projections so that PVF would have an adequate budget to pay for its substantive campaign-related activities. The money

used to pay for the solicitation materials was paid by ILA back in March and July, 1988.

The Court finds that the October 20 payment was not a reimbursement of solicitation expenses and was instead an illegal contribution in violation of the FECA.

III. *The Constitutional Status of the FEC*

In their motion for summary judgment, defendants have also made the argument that the Federal Election Commission is unconstitutional. They claim the statutory scheme for appointing Commissioners infringes on the presidential appointment power granted in the Constitution because the President is prevented from appointing more than three Commissioners from the same political party. They further claim that because the Commissioners cannot be controlled or removed by the President, execution of the laws is being entrusted to someone other than the President, who under Article II is to have the sole executive power. Finally, they claim there is a violation of separation of powers because the Secretary of the Senate and the Clerk of the House sit on the Federal Election Commission as non-voting *ex officio* members.

Defendants have read the Constitution correctly. Article II gives the President alone the power to appoint officers of the United States and the power to execute the laws. It follows, therefore, that it is the President and not the NRA who can challenge alleged infringements of presidential powers because only the President's interests are affected. Plaintiffs bringing suit must, at a minimum, allege facts that show a personal stake in the outcome of the question

posed. *See Warth v. Seldin*, 422 U.S. 496, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.") Moreover, the Court also said that a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties." 422 U.S. at 499. *See also Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (No standing to raise claim where relief sought by plaintiff is too attenuated from basis of claim).

The same principles apply to the defendants in this case. Any attempt to show that defendants' interests have been harmed by the statutory appointment scheme for the FEC would be speculative at best.[3]

[3] The Court notes that many so-called "independent agencies" operate under a scheme very similar to that governing the FEC. These agencies, including the Securities and Exchange Commission, the Interstate Commerce Commission, and the Federal Trade Commission, are sometimes called the "fourth branch of government." They have functioned admirably for decades. Indeed the Interstate Commerce Commission is over 100 years old, the FTC 75, and the SEC over 50. *See generally*, B. Schwartz, *Administrative Law* 7-11 (1988). There must be a presumption of regularity where organizations have performed their missions for many years.

Other courts have rejected arguments like the one set forth by defendants. For example, the Ninth Circuit not long ago upheld the constitutionality of the Federal Trade Commission. *See FTC v. American National Cellular Inc.*, 810 F.2d 1511 (9th Cir. 1987). The Court stated in its opinion that officers of the United States who are appointed by the President but only removable by impeachment may enforce federal law. *Id.* at 1514.

Similarly, in *Mistretta v. United States*, 109 S.Ct. 647 (1989), the Supreme Court upheld the statutory scheme

And ultimately, defendants have raised an issue that bears on the rights of a third party, namely the President, and not on their own legal interests. Similarly, any claim that the presence of non-voting *ex officio* members of the FEC has harmed defendants' interests is equally speculative. There has been no allegation that either the Secretary of the Senate or the Clerk of the House influenced the outcome of FEC decisionmaking.

Indeed, defendants have not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question. They serve as non-voting members and as such have no real say in the outcome of any Commission proceedings. To declare the FEC unconstitutional because the statute allows certain individuals to sit as nonvoting members of the Commission would be an excessive remedy for what is only an alleged and insubstantial infringement. At best, if defendants are correct in their assessment of the Constitution, the appropriate remedy for the problem would be to bar the Secretary and the Clerk from attending Commission meetings. Since there has been no showing that these nonvoting members had any involvement in the decisions made in connection with this action, there is no need for

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creating the Sentencing Commission. Under that statute, the President is even further restricted in his appointment authority: he must appoint at least three federal judges to the Commission, and he must first consider a list of judges recommended by the Judicial Conference. As there are far fewer federal judges than there are members of any political party in this country, this requirement places a far tighter constraint on the presidential appointment power than the party restrictions that apply to the Federal Election Commission.

the Court to concern itself with this separation of powers argument.

IV. *Assessment of Penalties and Injunctive Relief*

Although the parties in this case have requested further oral argument on the issue of penalties, the Court believes that it has all the relevant information it needs to decide this issue. Plaintiffs are seeking one penalty from the PVF and Grant Wills and one from the ILA, each in the amout of the October 20 payment that constituted the violation. That amount is $415,744.72. The statute, 2 U.S.C. § 437(g)(a)(6)(A), allows the Court to assess a penalty no greater than the amount implicated in the violation, but it does not require that the Court select any particular amount.

To anyone reviewing the October 20 payment, it was obvious that the October 20 payment was not legally permissible. The defendants constructed a legal argument in an attempt to defend their actions, but that argument elevates form far above substance and holds no weight with this Court. Defendants could have achieved the end result of all these transactions in a legally permissible manner had they used better financial planning and realized that the PVF would ultimately need the money. Therefore, the Court does not find that defendants have engaged in the kind of impermissible conduct that would require the assessment of a penalty for the full $415,744.72. Such a penalty would simply not be proportional to the violative conduct. Moreover, the record does not indicate that the defendants are chronic violators of the campaign finance laws who need stiff punishment.

Nonetheless, the fact remains that the money was spent on campaign-related expenditures in violation of FECA. In recognition of that fact, the Court will assess a penalty against the defendants that will reflect the nature and the effect of the violation as well as the effort expended by the Commission and its staff in enforcing the federal election laws.

Accordingly, the Court will assess a penalty measured by the costs incurred by the FEC in investigating and prosecuting this action. Defendants shall pay the ordinary costs associated with litigation as well as the full amount of attorney's fees and other personnel expenses allocable to this action. Plaintiffs shall have fifteen days to provide the Court with an accounting of the costs involved.

Finally, plaintiffs seek an injunction that prohibits defendants from repeating the violation. Defendants maintained the position in open court that they had not violated the federal election laws, and they refused to promise that they would not repeat the transaction implicated here because they wished to maintain flexibility in their bookkeeping. Based on this representation, the Court finds that an injuction is appropriate because it is possible the violation will be repeated. As the Court noted at the hearing, if defendants maintain close scrutiny over their accounts, there should be no need to repeat the violation.

An appropriate order accompanies this opinion.

DATE: 11/15/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND, ET AL., DEFENDANT.

ORDER

[Filed Nov. 15, 1991]

For the reasons stated in the aforegoing opinion, it is this 15 day of November, 1991, hereby

DECLARED that defendants violated section 441b of the Federal Election Campaign Act when on October 20, 1988 the National Rifle Association—Institute for Legislative Action paid $415,744.72 to the NRA Political Victory Fund; and it is

ORDERED that defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participating with them in their activities, shall not make or receive payments made by a corporation to a segregated fund to reimburse said fund for solicitation expenses, unless such payments are made in accordance with each and every requirement of 11 C.F.R. § 114.5(b)(3), i.e. such payments are made no later than thirty days after

the segregated fund makes the initial expenditure for solicitation; and it is further

ORDERED that defendants shall pay a civil penalty measured by the amount of the total costs incurred by the Federal Election Commission in investigating and prosecuting this action. The plaintiff shall have fifteen days to submit to the Court, upon notice to the plaintiff, a full accounting of all such costs, including attorneys' fees, fees for other personnel, and other associated costs.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NATIONAL RIFLE ASSOCIATION, ET AL, DEFENDANTS.

MEMORANDUM OPINION

[Filed Dec. 11, 1991]

Plaintiffs originally brought this suit to obtain a declaratory judgment stating that defendants had violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455, when on October 20, 1988, the National Rifle Association—Institute for Legislative Action reversed an earlier transaction and transferred the same $415,744.72 back to the NRA Political Victory Fund. Plaintiffs claimed that this payment could not qualify as a legally permissible reimbursement for solicitation expenses because it was made too long after those expenses were incurred; rather, plaintiffs alleged the payment was an impermissible corporate contribution to a political committee. The Court heard argument on cross motions for summary judgment and granted summary judgment in favor of plaintiff, holding that the payment was indeed made in violation of the FECA.

Plaintiff also asked the Court to assess civil penalties against the defendants. The Court indicated that it would assess penalties, and asked plaintiff to submit the amount it expended in investigating and prosecuting this case to be used as a measure for determining the amount of the civil penalty.

Instead of providing the information requested, the plaintiff has now filed a Motion for Amendment or Clarification of the Court's Order. The plaintiff claims that using such information as a measure for assessing a civil penalty against defendants would thwart the purpose of the statute, i.e. deterrence. The plaintiff also asserts that it would be administratively burdensome for it to account for its costs and expenses.

The statute permits the Court to assess a penalty up to the amount involved in the violation which in this case is $415,744.72. *See* 2 U.S.C. § 437(g)(a)(6)(B). The Court believes the amount of U.S. government funds expended to investigate and prosecute defendants' conduct would provide information that would be relevant for purposes of measuring the amount to be assessed. In *Federal Election Commission v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit enumerated four factors to consider when determining the size of a penalty under the FECA. Those are:

> (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency. (citation omitted)

Id. at 1258. The plaintiff points to these factors as a means for guiding this Court's determination. It

does not explain how the factors can be translated into numbers.

Contrary to plaintiff's view, the Court believes that it did take into account the relevant factors in its consideration of an appropriate civil penalty. By asking plaintiff to submit an accounting of costs and expenditures, all the Court was seeking was to determine what penalty, within the statutory range, would be adequate to produce an appropriate assessment. It is obvious that the FEC is either unwilling or unable to provide the information requested.

Under the circumstances, I will set a civil penalty of $40,000, representing approximately 10% of the amount involved in the violation. This takes into account the dual factors that while the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements, the NRA defendants could have accomplished these objectives legitimately had they used proper fiscal planning.

Because of the deliberate nature of defendants' actions, the Court must impose a substantial penalty in order to deter them from repeating this violation. Despite defendants clear violation of FEC requirements, they continue to insist that they were in full compliance with all applicable requirements. To accept the NRA defendants' position would make a mockery of the campaign finance laws and would permit participants in campaign financing to avoid ever making a final accounting of their transactions. The NRA defendants must realize that their conduct cannot be repeated.

Accordingly, the Court will assess a civil penalty against the defendants in the amount of $40,000. The

Court hopes that by having defendants pay this amount, which the defendants undoubtedly worked hard to raise, the seriousness of the offense will be impressed upon them.

DATE: 12/10/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NATIONAL RIFLE ASSOCIATION, ET AL, DEFENDANTS.

ORDER

[Filed Dec. 11, 1991]

For the reasons given in the aforegoing memorandum opinion, it is this 10 day of December, 1991, hereby

ORDERED that defendants shall collectively pay a civil penalty in the amount of $40,000.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

APPENDIX C

BEFORE THE
FEDERAL ELECTION COMMISSION

RAD Referral 89L-28

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer
NATIONAL RIFLE ASSOCIATION-INSTITUTE
FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of October 17, 1989, do hereby certify that the Commission decided by a vote of 4-1 to take the following actions with respect to RAD Referral 89L-28:

1. Open a Matter Under Review (MUR).
2. Find reason to believe that the NRA Political Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a).
3. Find reason to believe that the National Rifle Association-Institute for Legislative Action violated 2 U.S.C. § 441b(a).

Commissioners Aikens, Josefiak, McDonald, and Thomas voted affirmatively for the decision; Com-

missioner Elliott dissented; Commissioner McGarry was not present at the time of the vote.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

Date: 10/18/89

APPENDIX D

BEFORE THE
FEDERAL ELECTION COMMISSION

MUR 2991

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer

NATIONAL RIFLE ASSOCIATION-INSTITUTE
FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on April 24, 1990, do hereby certify that the Commission decided by a vote of 4-1 to take the following actions in MUR 2991:

1. Find probable cause to believe that the NRA Political Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a).

2. Find probable cause to believe that the National Rifle Association-Instittue for Legislative Action violated 2 U.S.C. § 441b(a).

3. Approve the conciliation agreement attached to the General Counsel's report dated April 11, 1990, subject to the following changes:

   a) Correction of line seven in paragraph one on page one to state, probable cause to believe, in lieu of, reason to believe.

   b) Amendment on page three to provide for a civil penalty of Ten Thousand Dollars ($10,000.00).

4. Approve the letter attached to the General Counsel's report dated April 11, 1990.

Commissioners Elliott, Josefiak, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented; Commissioner McDonald was not present.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

4-26-90
Date

APPENDIX E

BEFORE THE
FELERAL ELECTION COMMISSION

MUR 2991

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer

NATIONAL RIFLE ASSOCIATION—
INSTITUTE FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on September 20, 1990, do hereby certify that the Commission decided by a vote of 4-0 to take the following actions in MUR 2991:

1. Authorize the Office of the General Counsel to file a civil suit for relief in the United States District court against the NRA Political Victory Fund and Grant A. Wills, as treasurer, and the National Rifle Association —Institute for Legislative Action.

2. Approve the appropriate letter as recommended in the General Counsel's report dated August 22, 1990.

Commisioners Elliott, Josefiak, McGarry, and Thomas voted affirmatively for the decision; Commissioners Aikens and McDonald were not present.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

9-20-90
Date

APPENDIX F

2 U.S.C. §§ 437c-438

§ 437c. Federal Election Commission

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compen-

sation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) *Voting requirements; delegation of authorities.* All decisions of the Commission with respect to the

exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

(d) *Meetings.* The Commission shall meet at least once each month and also at the call of any member.

(e) *Rules for conduct of activities; judicial notice of seal; principal office.* The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) *Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions.*

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be

paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either—

(A) by attorneys employed in its office, or

(B) by counsel whom it may appoint, on a temporary basis as may be necessary for

such purpose, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

§ 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) *Judicial orders for compliance with subpoenas and orders of Commission; contempt of court.* Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) *Civil liability for disclosure of information.* No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) *Concurrent transmissions to Congress or member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation.*

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) *Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the

exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96

of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct

or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the

respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a

knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district

court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) *Repealed.*

(11) If the Commission determines after an investigation that any person has violated an

order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification,

the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

§ 437h. Judicial review

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

§ 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall—

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purposes of this Act.

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any

information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record;

(5) keep such designations, reports, and statements for a period of 10 years from the date of receipt, except that designations, reports, and statements that relate solely to candidates for the House of Representatives shall be kept for 5 years from the date of their receipt;

(6) (A) compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail;

(B) compile, maintain, and revise a separate cumulative index of reports and statements filed by multicandidate committees, including in such index a list of multicandidate committees; and

(C) compile and maintain a list of multicandidate committees, which shall be revised and made available monthly;

(7) prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act;

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section;

(9) transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate; and

(10) serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of Federal elections. The Commission may enter into contracts for the purpose of conducting studies under this paragraph. Reports or studies made under this paragraph shall be available to the public upon the payment of the cost thereof, except that copies shall be made available without cost, upon request, to agencies and branches of the Federal Government.

(b) *Audits and field investigations.* The Commission may conduct audits and field investigations of any political committee required to file a report under section 434 of this title. All audits and field investigations concerning the vertification for, and receipt and use of, any payments received by a candidate or committee under chapter 95 or chapter 96 of title 26 shall be given priority. Prior to conducting any audit under this subsection, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. Such thresholds for compliance shall be established by the Commission. The Commission may, upon an affirmative vote of 4 of its members, conduct an audit and field investigation of any committee which does meet the threshold requirements established by the Commission. Such audit shall be commenced within 30 days of such vote, except that any audit of an authorized committee of a candidate, under the provisions of this subsection, shall be commenced within 6 months of the election for which such committee is authorized.

(c) *Statutory provisions applicable to forms and information-gathering activities.* Any forms prescribed by the Commission under subsection (a)(1) of this section, and any information-gathering activities of the Commission under this Act, shall not be subject to the provisions of section 3512 of title 44.

(d) *Rules, regulations, or forms; issuance, procedures applicable, etc.*

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or

regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5) (A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not

in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

(e) *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(f) *Promulgation of rules, regulations, and forms by Commission and Internal Revenue Service; report to Congress on cooperative efforts.* In prescribing such rules, regulations, and forms under this section, the Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent. The Commission shall report to the Congress annually on the steps it has taken to comply with this subsection.

APPENDIX G

2 U.S.C. § 441b

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers

concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15,[1] the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include

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[1] 15 U.S.C. § 791 (h) provides:

(h) Political contributions forbidden.

It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution.

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so

designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or facilitating the making of voluntary contributions to a separate segregated fund established

by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX H

11 C.F.R. § 114.5(b)(3)

§ 114.5 Separate segregated funds.

* * * *

(b) *Use of treasury monies.* Corporations, labor organizations, membership organizations, cooperatives, or corporations without capital stock may use general treasury monies, including monies obtained in commercial transactions and dues monies or membership fees, for the establishment, administration, and solicitation of contributions to its separate segregated fund. A corporation, labor organization, membership organization, cooperative, or corporation without capital stock may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions.

* * * *

(3) If the separate segregated fund pays any solicitation or other administrative expense from its own account, which expense could be paid for as an administrative expense by the collecting agent, the collecting agent may reimburse the separate segregated fund no later than 30 calendar days after the expense was paid by the separate segregated fund.

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